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In The

Supreme Court of the United States

October Term, 1994

CALIFORNIA DEPARTMENT OF CORRECTIONS, CALIFORNIA MEDICAL FACILITY, JAMES GOMEZ, EDWARD YLST, CAROLINE LOPEZ,

Petitioners,

v.

ALI MOYO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Title VII of the Civil Rights Act of 1964, Section 703(a)(1), 42 U.S.C. § 2000e-2(a)(1), prohibits an employer from discriminating against an employee on enumerated bases. Title VII, Section 704(a), 42 U.S.C. § 2000e-3(a), prohibits an employer from retaliating against an employee because that employee opposed any practice made unlawful by Section 703(a)(1) or because the employee participated in any proceeding involving charges of discrimination under Section 703(a)(1). The questions presented are:

1. In what circumstances, if any, can a prison inmate be found to be an employee of the prison in which the inmate is incarcerated under Section 703(a)(1)?

2. In what circumstances, if any, can a non-inmate prison employee state a retaliation claim under Section 704(a) for having opposed the prison's alleged discriminatory conduct against a prison inmate on the sole ground that an employer-employee relationship exists between the prison and the inmate under Section 703(a)(1)?

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners California Department of Corrections, California Medical Facility, James H. Gomez, Edward Ylst and Caroline Lopez respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix, hereinafter cited "App.," at 1-9) is reported at 32 F.3d

1382. The memorandum and order of the district court (App. at 13-17) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 8, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a)(1), provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer – (1) . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race . . . .

Title VII, section 704(a), 42 U.S.C. § 2000e-3(a) provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT

Respondent, Ali Moyo, instituted this action by Title VII Civil Complaint filed in the United States District Court, Eastern District of California in December 1991.[1]

Respondent's First Amended Complaint and Request for Jury Trial invoked federal subject matter jurisdiction pursuant to 42 U.S.C. section 2000e-5(f) and 28 U.S.C. section 1343(4). Respondent's Amended Complaint alleged as a first cause of action that Petitioners had violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq. by retaliating against Respondent, a black male, for protesting and refusing to participate in unfair favoritism for a white inmate over black inmates. Although not specifically enumerated in Respondent's Amended Complaint, a subsequent pleading filed by Respondent acknowledged that his Title VII

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[1] Plaintiff was in pro per at the time he instituted this action. Pursuant to Order filed July 24, 1992, attorney Carlos Alcala was substituted as counsel for Respondent Moyo. Respondent's First Amended Complaint named as Defendants the State Department of Corrections, James Gomez as Director of State Department of Corrections, Eddie Ylst, M.D. Smith and C. Lopez. Defendant M.D. Smith has never been served with summons or complaint. Respondent's initial Complaint also named as Defendants James Waller, Ruth M. Friedman, Carlos M. Alcala, California Correctional Peace Officer Assoc., Lieutenant D.A. Mayle, Lieutenant W. Anderson, Lieutenant R.F. Creech, Lieutenant M. Martel, Sergeant J. Dorough, Sergeant D.R. Ingel, Sergeant K.B. Clement, Sergeant D. Hansen, and Correctional Officer J.D. Smith. Said Defendants were deleted from Plaintiff's First Amended Complaint which was filed pursuant to Order filed July 24, 1992.

claim depended exclusively upon alleged violations of section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a).

The district court granted Petitioners' Motion to Dismiss Respondent's Amended Complaint pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6), on the ground that the conduct charged in Respondent's Complaint filed with the United States Equal Employment Opportunity Commission (hereinafter sometimes "EEOC") was based solely on Respondent's opposition to discriminatory treatment of inmates and that such conduct is not prohibited, and could not reasonably be considered to be prohibited, by Title VII. (App. at 15-16.) The district court concluded that the filing of an EEOC claim based on such conduct would be insufficient to trigger the protection afforded under section 704(a) of Title VII. (App. at 16.)

Respondent timely appealed the district court's dismissal of his Amended Complaint. The Ninth Circuit Court of Appeals reversed and remanded to the district court. (App. at 3.)

A. Facts Material to the Questions Presented

This case involves the construction of sections 703(a)(1) and 704(a) of Title VII, 42 U.S.C. §§ 2000e-2(a)(1), 2000e-3(a). Section 704(a) contains two discrete clauses known, respectively, as the "opposition clause" and the "participation clause." *Sias v. City Demonstration Agency*, 588 F.2d 692, 694-95 (9th Cir. 1978). Because section 704(a) incorporates by reference the unlawful employment practices set forth in section 703(a)(1) of Title VII, to sustain a claim of unlawful retaliation under

the opposition clause of section 704(a), the opposed conduct must fall within the protection of 703(a)(1). *Learned v. City of Bellevue*, 860 F.2d 928, 932 (9th Cir. 1988). Similarly, an employee's participation in an investigation or proceeding involving charges of discrimination does not automatically invoke the protection afforded under section 704(a); the underlying discrimination must reasonably be perceived as discrimination prohibited by section 703(a)(1). *Id.*

Respondent's Title VII claim under section 704(a) alleges violations of both the opposition clause and the participation clause and arises solely out of Respondent's allegation that he is a black male who was retaliated against for protesting and refusing to participate in unfair favoritism for a white inmate over black inmates. To show that the alleged conduct which underlies Respondent's section 704(a) claim constitutes discrimination prohibited by section 703(a)(1), Respondent relied on *Baker v. McNeil Island Corrections Center*, 859 F.2d 124 (9th Cir. 1988) for the proposition that an employer-employee relationship existed between Petitioner California Department of Corrections and the black inmates as to whom Respondent protested and refused to participate in unfair favoritism.

In its opinion in *Moyo v. Gomez*, 32 F.3d 1382 (9th Cir. 1994), the Ninth Circuit found that Respondent herein could support his claim under section 704(a) by showing an employer-employee relationship under section 703(a)(1) between Petitioner California Department of Corrections and the inmates as to whom Respondent protested alleged acts of unfair favoritism. (App. at 5-6.)

The United States Equal Employment Opportunity Commission and the Tenth Circuit Court of Appeals have refused to find an employee-employer relationship between an inmate and the prison in which the inmate is incarcerated under section 703(a)(1). (App. at 18-25 (U.S. Equal Employment Opportunity Commission Decision No. 86-7 (CCH) ¶ 6865 (April 18, 1986)); (App. at 26-33 (Equal Employment Opportunity Commission, Policy Statement: Work Release Programs (signed May 30, 1986) No. 93, N:3161, EEOC Compliance Manual, Vol. 3, BNA (8/86) p. 19)); *Williams v. Meese*, 926 F.2d 994, 997 (10th Cir. 1991). Rather, the EEOC and the Tenth Circuit agree that the only circumstance in which an inmate can invoke Title VII against the prison in which the inmate is incarcerated is where an inmate claims that the prison has interfered with the inmate's employment opportunities with a third party employer or prospective employer of the inmate. (App. at 25, 32-3); *Williams*, 926 F.2d at 997.

Thus, the essential question presented herein is in what circumstances, if any, an employee-employer relationship can be found between an inmate and the prison in which the inmate is incarcerated under Title VII, Section 703(a)(1).

B. Proceedings Below

Respondent's First Amended Complaint alleged three claims for relief, the first of which was brought pursuant to Title VII, section 704(a). Respondent's second and third claims for relief alleged pendent state claims under the California Fair Employment and Housing Act,

California Government Code § 12940(f), and were predicated on the same factual allegations as those set forth in Respondent's first claim for relief under Title VII.

Respondent's claims for relief arise out of Respondent's allegation that he is a black male who was retaliated against for protesting and refusing to participate in unfair favoritism for a white inmate over black inmates. The additional incidents of retaliation alleged by Respondent related directly to Respondent's opposition to Petitioner's alleged discriminatory practices favoring a white inmate over black inmates.

In August 1992, Petitioners herein moved to dismiss Respondent's Amended Complaint under Federal Rules of Civil Procedure, Rule 12(b)(6), on the ground that Respondent was unable to state a claim under section 704(a) in that his alleged protests of and refusal to participate in unfair favoritism for a white inmate over black inmates failed to allege conduct prohibited by section 703(a)(1) of Title VII.

By memorandum and order filed October 14, 1992, the district court granted Petitioners' motion to dismiss Respondent's Title VII claim on the ground that the relationship between an inmate and a correctional system is not one of employee-employer; thus, Respondent's allegations of discriminatory treatment of inmates did not fall within the protection of Title VII. (App. at 16.)

On appeal, the Ninth Circuit reversed and remanded the district court's dismissal of Respondent's complaint. (App. at 3.) Central to the question herein presented for review is the ground for reversal articulated by the Ninth Circuit in which it relied on the Ninth Circuit opinion in

Baker v. McNeil Island Correction Center, 859 F.2d 124 for the proposition that "inmates performing work assignments that include compensation or training, or that resemble work release rather than forced labor, are employees entitled to Title VII protection." (App. at 5.) The Ninth Circuit interpreted *Baker* to permit a retaliation claim to be stated if the character of the work performed by the inmates could reasonably be distinguished from the obligatory, on-site prison labor deemed outside of Title VII's protection by the EEOC. (App. at 6.) Thus, the Ninth Circuit would permit Respondent to proceed on his section 704(a) claim by establishing an employee-employer relationship under section 703(a)(1) between the black inmates as to whom Respondent opposed unfair favoritism and Petitioner California Department of Corrections.

The Ninth Circuit also reversed the district court's dismissal on the basis that Respondent would be able to state a retaliation claim under section 704(a) if he could show that he was discharged for refusing to discriminate against black inmates irrespective of whether the inmates were employees under Title VII. (App. at 5, 7.)

The Ninth Circuit reversed the district court's denial of Respondent's motion for leave to amend his Complaint on the basis that Respondent's allegation that he suffered adverse employment action for refusal to carry out a policy of discrimination against black inmates by denying them showers stated a claim of racially based harassment under Section 703(a). (App. at 7-9.)

On August 22, 1994, Petitioners herein filed Appellees' Suggestion for Rehearing En Banc as to the Ninth

Circuit panel opinion in *Moyo v. Gomez*. By Order filed September 8, 1994, the Ninth Circuit panel which issued the *Moyo* opinion ordered that Petitioners' "petition for rehearing and suggestion for rehearing en banc" filed August 22, 1994 be stricken as violative of Federal Rules of Appellate Procedure, Rule 40(b) and further ordered that no motions to reconsider said order would be entertained. (App. at 11.) Said order did not specify the manner in which Rule 40(b) had been violated. Further, Petitioners did not include a petition for rehearing in the suggestion for rehearing en banc, nor have Petitioners ever filed a petition for rehearing of the *Moyo* panel opinion.

On September 14, 1994, Petitioners attempted to file Appellee's Amended Suggestion for Rehearing En Banc to comport with Federal Rules of Appellate Procedure, Rule 40(b). By Order filed October 5, 1994, the Ninth Circuit panel "expressed no desire to take further action." (App. at 10.)

On September 22, 1994, Petitioners herein filed in the Ninth Circuit Court of Appeals Defendants/Appellees' Notice of Motion and Motion for Stay of Mandate Pending Application to Supreme Court for Writ of Certiorari. As of the date of the filing of the instant Petition for A Writ of Certiorari, the Ninth Circuit has taken no action with respect to Petitioners' Motion for Stay of Mandate.

As of the date of the filing of the instant Petition, the Ninth Circuit has not issued an order of mandate with respect to its opinion herein filed August 8, 1994.

REASONS FOR GRANTING THE PETITION

This case presents an urgent question of first impression in this Court respecting an important question of federal law which has not been, but should be, settled by this Court. At issue herein is whether an employee-employer relationship can be found between a prison inmate and the prison in which the inmate is incarcerated under Title VII of the Civil Rights Act. The U.S. Equal Employment Opportunity Commission in Decision 86-7 and in its Policy Statement on Work Release Programs and the Tenth Circuit Court of Appeals have resolved that question by holding that an inmate *cannot* be an employee of the prison in which the inmate is incarcerated for the purposes of Title VII. (App. at 24-5, 32); *Williams v. Meese*, 926 F.2d 994, 997 (10th Cir. 1991). These authorities further agree that the protections of Title VII apply to an inmate only upon a showing that the prison has interfered with the inmate's employment opportunities with a third party employer or prospective employer of the inmate. (App. at 25, 32-3); *Williams*, 926 F.2d at 997.

The EEOC is empowered by Congress "to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of [Title VII]" (42 U.S.C. § 2000e-5). Thus, the Equal Employment Opportunity Commission Decision and Policy Statement which articulate the rule that an employer-employee relationship cannot exist between a prison and an inmate under Title VII embody a rule of national application in which there is a vital need for uniformity. Accordingly, it is self-evident that where, as here, a court of appeals opinion substantially deviates from an established EEOC

rule, an important question of federal law is presented which requires settlement by this Court.

The magnitude of the question presented herein is further evidenced by the fact that, according to the most recent census issued by the United States Bureau of Justice, in 1992, in excess of 1,300,000 persons were incarcerated in federal, state and local prison facilities in the United States and by the related fact that virtually all federal, state and local prisons are subject to the provisions of Title VII by virtue of their status as employers of non-inmate employees. (*See*, App. at 27, 30.)

Prior to the Ninth Circuit opinion in *Moyo*, Title VII could not be invoked as between an inmate and the prison in which he was incarcerated absent a claim of interference by the prison with a third party employer or prospective employer of an inmate. (App. at 24-5, 32-3); *see, Williams v. Meese*, 926 F.2d at 997. The Ninth Circuit in *Moyo* drastically diverges from EEOC Decision 86-7 and the Policy Statement on Work Release Programs by now finding that *an inmate can be an employee of the prison* in which the inmate is incarcerated under Title VII. (App. at 5-6.)

By omitting an element which both the EEOC and the Tenth Circuit find critical to extend the protections of Title VII to an inmate, the Ninth Circuit has created a new class of persons to whom Title VII will now apply, to wit, hundreds of thousands of inmates incarcerated in federal, state and local prisons. Because *Moyo* substantially affects a rule of national application in which there is a vital need for uniformity, this case presents an urgent question

of first impression which has not been, but should be, settled by this Court.

I. The Question Presented Involves Federal Law in Which Uniformity of National Application is Vital

The Ninth Circuit opinion in *Moyo* construes Title VII to permit an inmate to be an employee of the prison in which he is incarcerated for purposes of Title VII. (App. at 5-6.) This is evidenced by the Ninth Circuit's statement that Respondent would be able to state a claim for retaliation against Petitioners under section 704(a) by establishing an employer-employee relationship between Petitioner California Department of Corrections and the black inmates as to whom Respondent opposed unfair favoritism. (*Id.* at 5.) As demonstrated herein, this construction of Title VII by the Ninth Circuit substantially deviates from the EEOC rule which precludes finding an employer-employee relationship between prison and inmate.

In EEOC Decision No. 86-7, inmate charging party alleged that, while he was incarcerated, respondent state correctional facility violated Title VII by removing him from his position in a prison maintenance crew and refusing to allow him to apply for another position on the basis of his race. (App. at 19-20.) The EEOC held that "[t]he Commission does not have jurisdiction over this charge because of the absence of an employment relationship between respondent and charging party." (*Id.* at 19.)

In Decision 86-7, the issue to be decided was "whether coverage of [Title VII] extends to allegations of racial discrimination with respect to work performed by a

prison inmate for a state correctional institution during the period of the inmate's incarceration." (*Id.* at 20.) The EEOC commenced consideration of this issue by observing that: whether Title VII applies to inmates in the situation presented appeared to be one of first impression; Title VII is silent as to this question; neither the legislative history of Title VII nor its amendments contain reference to this question; and no court decisions had addressed the question. (*Id.* at 21.)

The EEOC first addressed the definition of employee as set forth in the pertinent statute and discerned that, under relevant federal case law, no uniform test exists for determining whether an individual falls within the definition of "employee" set forth in Title VII. (*Id.* at 22.) The EEOC acknowledged that the definition of "employee" is entitled to liberal interpretation to effectuate the purposes of the Act; however, such interpretation does not permit an overly expansive construction that would distort traditional concepts of employment relationships. (*Id.* at 23.)

The EEOC observed that although the work relationship between the inmate and the correctional facility contained various elements commonly present in an employment context and which would normally strongly indicate the existence of an employer-employee relationship:

> [the] relationship [between charging party and the respondent] arose from the Charging Party's having been convicted and sentenced to imprisonment in the respondent's correctional institution. *The primary purpose of their association was incarceration, not employment. Consequently,*

> *the respondent exercised control and direction not only over the charging party's work performance but over the charging party himself.* The conditions under which he performed his job were, thus, functions of his confinement to the respondent's institution under its control. While the charging party *received monetary compensation* for his work, that compensation was minimal and, arguably, the greater consideration was the opportunity to earn 'good time' credits toward reducing his sentence. Finally, although the charging party *was not required to work for the respondent*, his very job flowed from his incarceration and was dependent on his status as a prison inmate. Considering these circumstances as a whole, we are persuaded that the reality of the work relationship between the respondent and the charging party was not one of employment. Therefore, we find that, while the respondent is an employer within the meaning of the Act, the charging party was not an employee of the respondent.

(*Id.* at 23-4 (emphasis added).)[2]

Based on the foregoing analysis, the EEOC concluded that the requisite employment relationship did not exist

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[2] In so finding, the EEOC also relied on the Department of Labor's interpretation of the term "employee" under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.* (1982). "Section 3(e)(1) of that Act defines 'employee' in virtually the same words as does Title VII. It is the position of the Department of Labor, which enforces the Fair Labor Standards Act, that, in circumstances such as those presented by this charge, a prison inmate is not an employee of the prison." (App. at 24 (citing Department of Labor, Wage and Hour Division, Field Operations Handbook, § 1029(a) (June 24, 1975)).)

between the inmate and the state correctional facility for the EEOC to exercise jurisdiction over the charge. (*Id.* at 25.)

Decision 86-7 was succeeded by and cited in the EEOC Policy Statement on Work Release Programs. (App. at 26, 32.) The Policy Statement on Work Release Programs was engendered by charges before the EEOC that raised the issue of whether coverage under Title VII extends to organizations engaged in operating or administering work release programs for inmates. (*Id.* at 26.) Such work release programs allow certain inmates to leave their correctional facility daily for employment, training, or education and require inmates to spend non-working hours at the correctional facility. (*Id.*)

The factual situation presented in the Policy Statement raised the following issues:

> (1) Whether Title VII's coverage extends to allegations of racial discrimination by the [respondent state] department of labor in failing to place inmates in employment and training opportunities, and (2) whether the Act's coverage extends to allegations of racial discrimination by the [respondent] jail in failing to approve inmates for participation in the work release program and failing to refer them to the [respondent state] department of labor.

(*Id.* at 27-8.)

Finding that both the respondent department of labor and the respondent jail were, respectively, an employment agency and an employer covered by Title VII, the EEOC determined that the inmate charging party was not

an employee of the respondent jail, as the term employee is defined in Title VII. (*Id.* at 28-30.)

Acknowledging the general principle that the connection with an employment relationship required to invoke Title VII's protections encompasses situations where a third party subject to Title VII has the ability to control or interfere with the employment opportunities of another employer and its employee, the EEOC addressed whether Title VII applied to the respondent jail because it had the ability to control or interfere with the employment relationship between an inmate and a potential employer. (*Id.* at 30-2.) In that regard, the EEOC separately addressed the inmate's allegations that: 1) more whites than blacks were selected to participate in the work release program; and 2) after he had been selected for the work release program, the jail discriminatorily denied his approval for employment with a particular employer because of his race. (*Id.* at 32-3.) In finding that the respondent jail was not covered by Title VII when it engaged in the determination whether individual inmates were eligible for participation in the work release program, the EEOC elaborated:

> When the jail is deciding whether a particular inmate is eligible for work release, the only existing relationship is between the inmate and the jail. At that point, the inmate is not yet a potential employee and no potential employment relationship exists between the inmate and another employer. *The inmate and the jail are in the same relationship to one another as were the prisoner and the prison in Commission Decision No. 86-7, where we stated that '[t]he primary purpose of*

> *their association was incarceration, not employment'.*

(*Id.* at 32 (emphasis added).)

With respect to the conduct of respondent jail after the inmate had been selected for the work release program, the EEOC concluded:

> It is the Commission's view that, once an inmate is in the work release program, he is seeking an employment opportunity with an employer. When an inmate has an employment opportunity which is subject to approval by the sheriff, the jail becomes a third party who has the ability to control or interfere with the inmate's employment opportunities with another employer, and its activities are covered by the Act.

(*Id.* at 32-3.)

The EEOC Policy Statement on Work Release Programs was cited with approval in the Ninth Circuit Court of Appeal opinion in *Baker v. McNeil Island Corrections Center*, 859 F.2d 124 (9th Cir. 1988).[3]

In *Baker*, the Ninth Circuit addressed what then was a question of first impression in all circuits: whether a prisoner was able to state a claim against the prison in which he was incarcerated under section 703 of Title VII. *Id.* at 126.

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[3] As previously noted, Respondent herein relied on *Baker* to support his contention that the inmates as to whom Respondent protested unfair favoritism were employees of Petitioner California Department of Corrections.

In *Baker*, the inmate pro se plaintiff's action against the prison under section 703 of Title VII arose out of his having applied for a job as a library aide in the prison library and, thereafter, not having been chosen for such position. *Id.* Plaintiff alleged he was not selected solely because of his race and that the state librarian did not want to work with a black man. *Id.* Defendant prison moved to dismiss the plaintiff's complaint, *inter alia*, under Federal Rule of Civil Procedure 12(b)(6) on the grounds that no employment relationship existed between the prison and plaintiff and that the prison had not interfered in plaintiff's employment opportunities with another. *Id.* at 126. The district court adopted the magistrate's report finding Title VII inapplicable to prison work assignments and granted defendant's motion to dismiss. *Id.* Plaintiff appealed on the ground that an employer-employee relationship existed in the paid state library position, thus rendering Title VII applicable to his claim. The Ninth Circuit panel reversed the district court's dismissal. *Id.*

The Ninth Circuit in *Baker* initiated its analysis of plaintiff's Title VII claim by iterating the general principle that the connection with an employment relationship which is prerequisite to the application of Title VII protections may be satisfied *indirectly by circumstances in which a defendant who is subject to Title VII interferes with an individual's employment opportunities with another employer.* *Id.* at 127-28 (citing *Lutcher v. Musician's Union Local 47*, 633 F.2d 880, 883 & n.3 (9th Cir. 1980)).

The Ninth Circuit concluded that the plaintiff's complaint should not have been dismissed because: (1) application of the most important factor in an "economic

realities" analysis to distinguish employees from independent contractors suggested that plaintiff was an employee; (2) plaintiff's pleadings supported an inference of an employment relationship between plaintiff and state librarians; (3) the Equal Employment Opportunity Commission Policy Statement on Work Release Programs could apply to the library aide position sought by plaintiff; and (4) 42 U.S.C. § 2000e-2(d), which section prohibits discrimination in apprenticeships or other training, could apply to the library aide position. *Id.* at 128-29.

Based on *Baker*'s reliance on the general principle enunciated both in *Lutcher* and in the EEOC Policy Statement that Title VII may apply in circumstances in which a defendant, who is otherwise subject to Title VII, interferes with an individual's employment opportunities with another employer, *Baker*'s conclusion that plaintiff's complaint was sufficient to state a claim under Title VII appeared to be limited to circumstances in which an inmate alleges that a prison, which prison otherwise is subject to Title VII, has interfered with an employment opportunity between the prisoner and a third party employer or prospective employer of the prisoner.

This interpretation of *Baker* is found in the Tenth Circuit Court of Appeals Opinion in *Williams v. Meese*, 926 F.2d 994 (10th Cir. 1991). In *Williams*, the Tenth Circuit addressed, *inter alia*, whether plaintiff, an inmate in a federal penitentiary, was an "employee" for purposes of Title VII. (*Id.* at 997.) Recognizing that "Title VII protections apply only where there is some connection with the employment relationship," *id.* (citing *Baker*, 859 F.2d at 127 (citing *Lutcher*, 633 F.2d at 883)), the Tenth Circuit followed EEOC Decision 86-7 and unequivocally held

that *an inmate cannot be an employee of the prison in which he is incarcerated for purposes of Title VII. Williams*, 926 F.2d at 997.

In *Moyo*, the Ninth Circuit expansively interprets *Baker* to find that an inmate can be an employee of the prison in which the inmate is incarcerated under Title VII. (App. at 5-6.) As applied to the facts of this case, the Ninth Circuit's construction of Title VII would allow Respondent to proceed with his section 704(a) claim against Petitioners on the basis that the inmates as to whom Respondent opposed unfair favoritism are employees of Petitioner California Department of Corrections. (*Id.*) In so construing Title VII, the Ninth Circuit inexplicably disregards the rule articulated by the EEOC that an inmate *cannot* be an employee of the prison in which he is incarcerated for the purposes of Title VII.

Under *Moyo*, hundreds of thousands of inmates will now be entitled to pursue a discrimination complaint under Title VII on the ground that an employee-employer relationship exists between the inmates and the prisons in which they are incarcerated. This deviation by the Ninth Circuit from the EEOC Decision and Policy Statement substantially affects a rule of national application in which uniformity is vital and significantly affects all federal, state and local prisons, as well as the U.S. EEOC and federal and state judiciary. Accordingly, this petition for writ of certiorari presents an urgent question of first impression which should be settled by this Court.

II. The Court of Appeals' Interpretation of Title VII Conflicts With the Tenth Circuit's Interpretation

In *Williams v. Meese*, 926 F.2d 994, 997 (10th Cir. 1991), the Tenth Circuit addressed, *inter alia*, whether plaintiff, an inmate in a federal penitentiary, was an "employee" for purposes of Title VII. The Tenth Circuit concluded that:

> [P]laintiff is *not* an 'employee' under . . . Title VII . . . because *his relationship with the Bureau of Prisons, and therefore, with the defendants, arises out of his status as an inmate, not an employee.* Although his relationship with defendants may contain some elements commonly present in an employment relationship, it arises 'from [plaintiff's] having been convicted and sentenced to imprisonment in the [defendants'] correctional institution. *The primary purpose of their association [is] incarceration, not employment.' Prisoner Not Protected From Racial Job Bias*, 2 Empl. Prac. Guide (CCH) ¶ 6865 at 7099 (April 18, 1986) (EEOC Decision No. 86-7). Since plaintiff has no employment relationship with defendants, he cannot pursue a claim for discrimination against them under . . . Title VII. . . .

Id. (emphasis added).

Thus, the Tenth Circuit has held unequivocally that an inmate cannot be an employee of the prison in which he is incarcerated for purposes of Title VII. *Id.* In that context, the Tenth Circuit's brief reference to *Baker* for the proposition that "Title VII protections apply only where there is some connection with an employment relationship," followed by the Tenth Circuit's unqualified holding that an inmate cannot be an employee of the prison in which he is incarcerated for purposes of Title VII, forecloses any inference that the Tenth Circuit construed *Baker* to permit an employment relationship between an inmate and the prison in which he is incarcerated. *See id.* (quoting *Baker*, 859 F.2d at 127).

The direct conflict between the Tenth Circuit opinion in *Williams v. Meese* and the Ninth Circuit panel opinion

in *Moyo* is evidenced by *Moyo*'s construction of *Baker* to find an inmate to be an employee entitled to Title VII protection merely upon a showing that the inmate performs "[1] work assignments that include compensation or training, or [2] that resemble work release rather than forced labor . . . [,]" or are "[3] similar to the 'rehabilitative' work assignments accorded Title VII protection in *Baker*." (App. at 5-6.) The Ninth Circuit's opinion that *any inmate* who is able to satisfy any one of the three foregoing requirements *is an employee of the prison* in which he is incarcerated for the purposes of Title VII cannot be reconciled with the Tenth Circuit's holding that *an inmate cannot be an employee of the prison* in which he is incarcerated under Title VII. *Williams*, 926 F.2d at 997.[4]

Because the Ninth Circuit opinion in *Moyo* directly conflicts with the Tenth Circuit opinion in *Williams v. Meese*, the Petition for Writ of Certiorari should be granted.

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[4] The Ninth Circuit's construction of *Moyo* also directly conflicts with EEOC Decision 86-7 in that the inmate charging party therein received monetary compensation and was not required to work for the respondent correctional institution. (App. at 24.) Because the inmate received compensation and was not subject to forced labor, *Moyo* would find the inmate in Decision 86-7 to be an employee entitled to the protections of Title VII. (App. at 5.)

CONCLUSION

For all of the foregoing reasons, Petitioners herein respectfully request that this Court grant the Petition for a Writ of Certiorari.

DATED: November 7, 1994

Respectfully submitted,

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Counsel for Petitioners

Ali MOYO Plaintiff-Appellant

v.

James GOMEZ, Director of California Department of Corrections; Eddie Ylst, Warden, at California Medical Facility, et al.; California Department of Corrections, et al.; Does 1 through 10, inclusive, Defendants-Appellees.

No. 92-16996.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted March 17, 1994.

Decided Aug. 8, 1994.

Prison officer sued California Department of Corrections for alleged retaliation in violation of Title VII of the Civil Rights Act. The United States District Court for the Eastern District of California. William B. Shubb, J., dismissed action for failure to state claim on which relief could be granted. Appeal was taken. The Court of Appeals, Reinhardt, Circuit Judge, held that former prison officer, who claimed that he was disciplined for his refusal to follow alleged prison practice of denying showers after work periods to black prisoners while granting them to white prisoners, stated triable claim under Title VII, regardless of whether inmates were "employees" under Title VII.

Reversed and remanded.

Carlos M. Alcala, Sacramento, CA, for plaintiff-appellant.

Kenneth R. O'Brien, Victor J. James, II, Barbara L. Christiansen, Littler, Mendelson, Fastiff, Tichy & Mathieson, Sacramento, CA, for defendants-appellees.

Appeal from the United States District Court for the Eastern District of California.

Before: REINHARDT and LEAVY, Circuit Judges, and McLAUGHLIN, District Judge.*

REINHARDT, Circuit Judge:

Ali Moyo, a black corrections officer with the California Department of Corrections, appeals the district court's dismissal of his action brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Moyo's amended complaint alleges that he was fired by the California Department of Corrections for protesting against and refusing to cooperate with defendants' practice of allowing showers after work shifts to white inmates but not to black inmates working the same job shift, in violation of § 704(a) of Title VII.[1] The district

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* The Honorable Linda McLaughlin, United States District Judge for the Central District of California, sitting by designation.

[1] Section 704(a) provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship of other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has

court dismissed Moyo's action for failure to state a claim under Fed.R.Civ.P. 12(b)(6). Moyo timely appealed. In his appeal, he also contests the district court's refusal to allow him to amend his complaint to state a cause of action under § 703(a) of Title VII,[2] for discrimination against him with regard to terms and conditions of employment. We reverse and remand to the district court.

I.

Moyo's complaint may not be dismissed unless it appears certain that he can prove no set of facts in support of his claim which would entitle him to relief. *Baker v. McNeil Island Corrections Center,* 859 F.2d 124, 127 (9th Cir.1988). Moyo's allegations of material fact must be taken as true and construed in the light most favorable to his claim. *Id.*

In order to make out a prima facie case of discrimination based on opposition to an unlawful employment

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opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

[2] Section 703(a) provides, in pertinent part:

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin. . . .

practice under § 704(a), Moyo must show that (1) he engaged in a statutorily protected activity (*i.e.*, that he protested or otherwise opposed unlawful employment discrimination directed against employees protected by Title VII); (2) subsequently, he was disciplined or lost his job; and (3) a causal link exists between the protected activity and the adverse action. *See EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1012 (9th Cir.1983). It is not necessary, however, that the employment practice actually be unlawful; opposition clause protection will be accorded "whenever the opposition is based on a *'reasonable belief* that the employer has engaged in an unlawful employment practice." *Id.* at 1018 (emphasis added) (citations and footnote omitted). *See also Learned v. City of Bellevue*, 800 F.2d 928, 982 (9th Cir.1988); *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1411 (9th Cir.1987). Opposition can, of course, consist of a refusal to carry out an order or policy. An erroneous belief that an employer engaged in an unlawful employment practice is *reasonable*, and thus actionable under § 704(a), if premised on a mistake made in good faith. A good-faith mistake may be one of fact or of law. *See Jurado*, 813 F.2d at 1411 (English-only order not a Title VII violation as a matter of law, but opposition based on a reasonable belief that the order was discriminatory is protected).

The defendants point out that an administrative adjudication by the Equal Employment Opportunity Commission ("EEOC") holds that inmates working directly for a prison pursuant to state law requiring prisoners to work at hard labor are not "employees" within § 701(f) of Title VII. *See* EEOC Decision No. 88-7 (April 18, 1986) (inmate performing prison maintenance solely inside the prison

not an employee protected under Title VII). *See also Hale v. Arizona*, 993 F.2d 1887, 1893-95 (9th Cir.1983) (en banc) (inmates performing obligatory prison labor not employees under Fair Labor Standards Act). Nevertheless, the district court's dismissal of Moyo's complaint must be reversed for at least three separate reasons.

First, if Moyo can show that he was discharged for refusing to carry out or otherwise protesting the defendants' alleged policy of denying showers to black inmates after work shifts, he has stated a retaliation claim based on an unlawful employment practice – i.e., the alleged practice of requiring Moyo, as a condition of *his* employment, to discriminate against black inmates. Under the terms of § 704(a), requiring an employee to discriminate is itself an unlawful employment practice. If Moyo can demonstrate at trial that he was discharged for refusing to implement a policy that discriminates against blacks, he has stated a claim under that section and the question whether the inmates are "employees" under the Act, becomes wholly irrelevant.

Second, even if the status of the inmates were relevant, we would be unable to say, based on the bare facts in the complaint, that the inmates here were not "employees" under Title VII. As our decision in *Baker v. McNeil Island Corrections Center*, 859 F.2d 124 (9th Cir.1988), makes clear, inmates performing work assignments that include compensation or training, or that resemble work release rather than forced labor, are employees entitled to Title VII protection. In *Baker*, we reversed a district court's dismissal of a prison inmate's Title VII claim that he was discriminatorily denied

employment in a prison library. We noted that the position as a library aide, while not work release, paid a salary and included some training. Given these features, we held that it was "not beyond doubt that a claim could not be proved under Title VII." *Id.* at 128. Accordingly, Moyo may be able to state a retaliation claim under *Baker* if the character of the work performed by the inmates in this case can reasonably be distinguished from the obligatory, on-site prison labor deemed outside of Title VII's protection by the EEOC. The complaint on its face reveals no facts regarding the terms and conditions of the inmates' labor, and thus does not provide us with a basis for determining whether the particular prison labor assignments involved in this case constituted forced labor, as was the case in the EEOC decision, or were similar to the "rehabilitative" work assignments accorded Title VII protection in *Baker*. Thus, we cannot state with certainty at this stage of the proceedings that the inmates do not qualify as employees under Title VII.

Third, even if the inmates in this case did not qualify as "employees" under Title VII, Moyo would be able to state a retaliation claim if he could show that his belief that an unlawful employment practice occurred (i.e., that the inmates were employees protected by Title VII) was otherwise "reasonable". The reasonableness of Moyo's belief that an unlawful employment practice occurred must be assessed according to an objective standard – one that makes due allowance, moreover, for the limited knowledge possessed by most Title VII plaintiffs about the factual and legal bases of their claims. We note again that a *reasonable* mistake may be one of fact or law. We also note that it has been long established that Title VII,

as remedial legislation is construed broadly. *See Davis v. Valley Distributing Co.*, 522 F.2d 827 (9th Cir.1975), *cert. denied*, 429 U.S. 1090, 97 S.Ct. 1099, 51 L.Ed.2d 535 (1977). This directive applies to the reasonableness of a plaintiff's belief that a violation occurred, as well as to other matters.

In sum, we cannot say with certainty that the alleged employment discrimination did not violate § 704(a) of Title VII. Moyo would be able to state a retaliation claim if he could show that he was discharged for refusing to discriminate against black inmates. Such a claim would be based on the unlawful employment practice inherent in requiring Moyo to discriminate against blacks as a term or condition of employment. Under this theory of liability, the question whether the inmates are "employees" under Title VII would be wholly irrelevant. In addition, we cannot say with certainty from the face of the complaint either 1) that the inmates were not "employees" under Title VII, or 2) that, even if they were not, Moyo could not have *reasonably believed* that a violation of Title VII occurred. Accordingly, the district court's dismissal of Moyo's retaliation claim was improper. We reverse and remand for further proceedings consistent with our opinion.

II.

We also reverse the district court's denial of Moyo's motion for leave to amend his complaint. Before dismissing the action, the district court questioned counsel for both sides as to whether Moyo claimed that his firing was due to discrimination against him personally, or merely

as a result of retaliation for his protest against the alleged discriminatory treatment of black inmates. Moyo's counsel answered that Moyo's only claim was for retaliation. He soon thought better of this statement, and in a letter dated that same day stated that "[a]fter further reflection I believe . . . [that] Mr. Moya [sic] was diseriminated [sic] based on the terms and conditions of his employment when the Department of Correction's force [sic] a Black Correctional Officer, Mr. Moya [sic] to discriminate against Black inmates." "I further feel the complaint can be amended to include this cause of action," counsel added.

It appears that the district court was misled by plaintiff's counsel at oral argument; however, counsel sought to remedy his mistake shortly thereafter. Moyo is not seeking to pursue a facially groundless claim of discrimination with respect to terms and conditions of employment. He alleges that he was fired because he refused to carry out a policy of discrimination against black inmates by denying them showers. These allegations set forth a claim that the defendants subjected Moyo to an offensive work environment, one polluted by racial discrimination. Moyo would then have stated a claim of racially-based harassment under § 703(a). *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66, 106 S.Ct. 2899, 2405, 91 L.Ed.2d 49 (1986) ("[T]he phrase 'terms, conditions or privileges of employment' in [§ 703(a)] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . "), *quoting Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir.1971). Accordingly, in light of the facts alleged, the letter of Moyo's counsel sets forth a

plausible *theory* for a § 703(a) claim, one that could conceivably be proved at trial. Under the circumstances we do not think our liberal amendment rules permit the forfeiture of the possible claim that Moyo may possess, without affording him an opportunity to amend his complaint so as to attempt to state that claim. Accordingly, we remand with instructions to the district court to allow Moyo to amend his complaint to attempt to state a claim under § 703(a)(1) of Title VII.

The district court's judgment is REVERSED AND REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALI MOYO

Plaintiff - Appellant

v.

JAMES GOMEZ, Director, of California Department of Corrections; EDDIE YLST, Warden, at California Medical Facility, et al,.; CALIFORNIA DEPARTMENT OF CORRECTIONS, et al,.

Defendants - Appellees

ORDER
USCA NO.: 92-16996
DC#: CV-91-01716-WBS

(Filed Oct. 05, 1994)

The letter from appellees' counsel, received and dated September 14, 1994 and copies having been forward to the panel, the panel has expressed no desire to take further action.

DIRECTION FROM
THE COURT:

Cathy A. Catterson
Clerk of Court

/s/ Oscar Tagle
By: Oscar Tagle
Deputy Clerk

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALI MOYO Plaintiff - Appellant v. JAMES GOMEZ, Director, of California Department of Corrections, EDDIE YLST, Warden, at California Medical Facility, et al., CALIFORNIA DEPARTMENT OF CORRECTIONS, et al., Does 1 through 10 inclusive, Defendants - Appellees	No. 92-16996 D.C. No. CV 91-01716 ORDER (Filed Sept. 8, 1994)

Before: REINHARDT and LEAVY, Circuit Judges, and McLAUGHLIN, District Judge.*

We have reviewed the petition for rehearing and suggestion for rehearing en banc filed August 22, 1994, and order that it be stricken as violative of Fed. R. App. P. 40(b). The Clerk is directed to return all copies to petitioner's counsel at the address of record: Victor John James, II; Littler, Mendelson, Fastiff & Tichy; 400 Capitol Mall, 16th Fl., Sacramento, CA 95814-4410.

No motions to reconsider this order will be entertained.

*The Honorable Linda McLaughlin, United States District Judge for the Central District of California, sitting by designation.

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF CALIFORNIA

OFFICE OF THE CLERK
650 CAPITOL MALL
SACRAMENTO, CA 95814

Ali Moyo

v.

California Department of Corrections

JUDGMENT IN A CIVIL CASE
Civ.S. 91-1716 WBS

(Filed Oct. 15, 1992)

JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has reached its verdict.

X **DECISION BY COURT.** This action came to trial or hearing before the Court. The issues tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT THE JUDGMENT IS HEREBY ENTERED ACCORDING TO THE COURT'S ORDER FILED October 14, 1992.

ENTERED: October 15, 1992

Jack L. Wagner,
Clerk of the Court

By: /s/ George Miyasato,
G. Miyasato, Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ALI MOYO,
Plaintiff,

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,

Defendants.

NO. CIV. S-91-1716 WBS/JFM

MEMORANDUM AND ORDER

(Filed Oct. 14, 1992)

I. Background

Plaintiff, a correctional officer with the California Department of Corrections, filed a first amended complaint in this action on June 24, 1992, alleging violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, and the California Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code § 12940 *et seq.* Defendant now moves the court to dismiss the complaint for failure to state a claim upon which relief can be granted or, in the alternative, to strike any allegations immaterial to plaintiff's claims. Fed. R. Civ. P. 12(b)(6), (f).

The first amended complaint alleges that plaintiff, a Black male, was retaliated against for protesting racial discrimination. Complaint, ¶ 8. The retaliation is alleged to have been based on plaintiff's protesting of, and refusal to take part in, the discriminatory treatment of

Black inmates. Complaint, ¶¶ 9, 10. Plaintiff filed a complaint with the Equal Employment Opportunity Commission ("EEOC") on March 23, 1991. Complaint, ¶ 13. Plaintiff also filed administrative complaints with the California Department of Fair Employment and Housing ("DFEH") on April 19, and March 23, 1991, and April 2, 1992.

II. Analysis

A. Fed. R. Civ. P. 12(b)(6) Standards

On a motion to dismiss, the allegations of the complaint must be accepted as true. *Cruz v. Beto*, 405 U.S. 319, 322 (1972). The court is bound to give the plaintiff the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of the complaint. *Retail Clerks International Ass'n v. Schermerhorn*, 373 U.S. 746, 753 n.6 (1963). Thus, the plaintiff need not necessarily plead a particular fact if that fact is a reasonable inference from facts properly alleged. *Id.; see also Wheeldin v. Wheeler*, 373 U.S. 647, 648 (1963) (inferring fact from allegations of complaint).

In general, the complaint is construed favorably to the pleader. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Accordingly, the court may not dismiss the complaint for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him or her to relief. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In spite of the deference the court is bound to give to the plaintiff's allegations

however, it is not proper for the court to assume that "the [plaintiff] can prove facts which [he or she] has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged." *Associated Gen. Contractors, Inc. v. California State Counsel of Carpenters*, 459 U.S. 519, 526 (1983).

B. Title VII Claim

It does not appear from the pleadings that plaintiff's administrative claim filed with the EEOC was based on racial discrimination against him personally or retaliation for any activity other than his objection to the alleged discriminatory treatment of black inmates. Moreover, plaintiff's attorney admitted at oral hearing that his EEOC claim, and consequently his present Title VII claim, was predicated solely on a claim for retaliation under § 704(a), 42 U.S.C. § 2000e-3(a), for his objection to the treatment of black inmates.[1] Section § 704(a) prohibits an employer from retaliating against an employee because (1) he has opposed any practice made unlawful by Title VII or (2) has availed himself of activity protected under

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[1] Plaintiff now argues that he was discriminated against by his employer's requirement that he discriminate against black inmates. The argument is presented by letter sent to the court subsequent to oral hearing on the matter. The letter itself again admits that "the causes of action on the complaint" do not include a claim of racial discrimination. Moreover, it does not address the more important threshold question of whether any administrative complaint contained allegations of discrimination other than that of retaliation based on plaintiff's objections to the discriminatory treatment of inmates.

Title VII. Plaintiff's complaint does not state a claim under § 704(a).

Plaintiff argues that his opposition to the discriminatory treatment of inmates constitutes opposition to a practice made unlawful by Title VII. The court does not agree. The relationship between an inmate and the correctional system is not one of employee-employer. Although employees need not establish that the opposed conduct in fact violated Title VII to establish a valid claim of retaliation, the court does not find the alleged conduct of discriminatory treatment of inmates to "fairly fall within the protection of Title VII. . . . " *Learned v. City of Bellevue*, 860 F.2d 928, 932 (9th Cir. 1988), *cert. denied*, 489 U.S. 1079 (1989).

Similarly, the "mere fact that an employee is participating in an investigation or proceeding involving charges of some sort of discrimination . . . does not automatically trigger the protection afforded under section 704(a); the underlying discrimination must be reasonably perceived as discrimination prohibited by Title VII." *Id.* Plaintiff admits that the conduct charged in the EEOC complaint was based solely on the discriminatory treatment of Black inmates. As above stated, such conduct is not prohibited, and could not reasonably be considered to be prohibited, by Title VII. Thus, the filing of an EEOC claim based on such conduct would be insufficient to trigger the protection afforded under § 704(a). Accordingly, defendants' motion to dismiss plaintiff's Title VII claim must be granted.

C. FEHA Claims

Plaintiff specifically alleges in the second claim and infers in the third claim that defendants' actions violated Cal. Gov't Code 12940(f). That section is the California counterpart of 42 U.S.C. § 704(a). Where a claim pursuant to § 12940 is analogous to a federal Title VII claim, it is evaluated under federal law interpreting Title VII claims. *University of S. Cal. v. Superior Court,* 222 Cal. App. 3d 1028, 1035 (1990). For the same reasons that the Title VII claim was dismissed, the FEHA claims must be dismissed.

IT IS THEREFORE ORDERED that defendants' motion to dismiss be, and the same is, hereby GRANTED.

DATED: October 14, 1992

/s/ William B. Shubb
WILLIAM B. SHUBB
UNITED STATES
DISTRICT JUDGE

[¶ 6865] PRISONER NOT PROTECTED FROM RACIAL JOB BIAS

Decision of the U.S. Equal Employment Opportunity Commission, Decision No. 86-7, April 18, 1986.

Title VII – Civil Rights Act of 1964

Coverage – Employer-Employee Relationship – Prison Inmate – A prison inmate, although receiving $12 a month and "good time" credits toward a reduction of his sentence while performing prison maintenance work, was not an employee of the correctional facility that would entitle him to protection from racial discrimination in selections for assignment to such work. The primary purpose of the inmates' association with the facility was incarceration, not employment.

Back references. – ¶ 310.10,360.

[Full Text of EEOC Decision]

Issue

The Charging Party, who is White, was an inmate at the Respondent's state correctional facility. The Charging Party alleges that, while he was incarcerated, the Respondent engaged in an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964, as amended (Title VII or the Act), 42 U.S.C. § 2000e *et seq.* (1982), by removing him from his position and refusing to allow him to apply for another position on the basis of his race.

The Respondent contends that the Commission lacks jurisdiction over this charge because there was no

employment relationship between it and the Charging Party.

Holding

The Commission does not have jurisdiction over this charge because of the absence of an employment relationship between the Respondent and the Charging Party. Accordingly, the charge is dismissed.

Discussion

At the time he filed this charge, the Charging Party was a prison inmate in one of the Respondent's state correctional facilities. Although inmates are not required to work during the period of their incarceration, certain jobs are available within the facility for which inmates may apply. The Respondent, through a committee at the correctional facility, provides inmates with a list of these available jobs. The committee is responsible both for selecting qualified inmates for jobs and for terminating their job assignments.

In April 1982, the Charging Party applied for and was assigned to a job as a member of the maintenance crew for the prison compound. For performing this job, the Charging Party received twelve dollars a month and, in addition, earned "good time" credits toward a reduction of his sentence. He alleges that he was one of a number of inmates removed from their jobs in March of 1983 as part of an effort to achieve a racial balance among inmates holding job assignments. He further alleges that, while he was not allowed to apply for an open position,

Black inmates who had not worked as long as he had were allowed to retain their job assignments or were selected for positions made available as a result of the removal of the inmates previously holding those jobs.

The Respondent primarily bases its jurisdictional argument on various state statutory provisions concerning the status of inmates employed in prison industries or on public works projects.[1] Under state law, inmates performing such work are not state employees. Further relying on state law, the Respondent asserts that inmates have no right to employment and that such employment is a privilege granted by the state and one which may be revoked by the director of the state department of corrections.

The specific issue that must be decided is whether coverage of the Act extends to allegations of racial discrimination with respect to work performed by a prison inmate for a state correctional institution during the period of the inmate's incarceration.[2] All other jurisdictional requirements have been met.

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[1] The state statutory provisions relied upon by the Respondent are not specifically cited in this decision in order to maintain confidentiality of the parties to this charge as required by Sections 708(b) and 709(e) of the Act.

[2] The Charging Party was released from the Respondent's correctional facility several months after he filed the present charge. The Respondent's position that this charge should be dismissed as moot because of the Charging Party's release is without merit. If the Commission determines that jurisdiction exists over this charge, a finding of reasonable cause to believe that the Respondent unlawfully discriminated against the Charging Party as alleged would entitle the Charging Party to certain relief under Act. *Cf. Firefighters Local Union No. 1784 v. Stotts* [34

The issue of whether Title VII applies to inmates in this situation appears to be one of first impression. The Act itself is silent in this regard. Further, research has disclosed neither reference to this matter in the legislative history of the Act or its amendments nor court decisions addressing this question. In the absence of legislative guidance or judicial precedent, it is the Commission's view that this issue should be decided by determining, on the basis of the facts, (1) whether, with respect to the work he performed while incarcerated, the Charging Party may be considered to have been an employee of the Respondent for purposes of the Act or (2) if the Charging Party was not the Respondent's employee, whether the Respondent's action in removing him from his job assignment may nonetheless be said to have deprived the Charging Party of an employment opportunity or benefit. If either of the two stated conditions is satisfied, then the requisite relationship existed between the Respondent and the Charging Party for the Commission to exercise jurisdiction over this charge.

As to the first, that the Charging Party was not a state employee under state statutory provisions is not determinative of his status under the Act. Employee status under Title VII is a question of federal law, "to be ascertained through consideration of the statutory language of the Act, its legislative history, existing federal case law,

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EPD ¶ 34.415], 104 S. Ct. 2576 (1984) (case not moot, among other reasons, because White employees laid off or demoted in order to comply with district court's injunction would be entitled to be made whole if the layoffs and demotions were not in accordance with law).

and the particular circumstances of the case at hand." *Cobb v. Sun Papers, Inc.* [28 EPD ¶ 32.610]. 673 F.2d 337, 339 (11th Cir.), *cert. denied* [30 EPD ¶ 33.097]. 459 U.S. 874 (1982), quoting *Calderon v. Martin County* [25 EPD ¶ 31.625], 639 F.2d 271, 272-73 (5th Cir. 1981). *See also Amarnare v. Merrill Lynch, Pierce, Fenner & Smith,* 35 EPD ¶ 34.909 (S.D.N.Y. Oct. 10, 1984).

Section 701(f) of Title VII provides that, with certain exceptions not here relevant, the "term 'employee' means an individual employed by an employer. . . . " As noted by the court in *Cobb v. Sun Papers, Inc.* [28 EPD ¶ 32.610], 673 F.2d at 339, the Act contains no further elaboration of that definition, and the legislative history does not indicate how expansively the definition is intended to be read.

Under relevant federal case law, there is no uniform test for determining whether an individual falls within the definition of "employee" set forth in the Act.[3] While

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[3] In large part, courts that have addressed this question have done so in the context of deciding whether an individual should be considered an employee or an independent contractor. *See, e.g., Spirides v. Reinhardt* [20 EPD ¶ 30.073], 613 F.2d 826 (D.C. Cir. 1979). *See also Cobb v. Sun Papers, Inc.* [28 EPD ¶ 32.610], 673 F.2d 337 (11th Cir.), *cert. denied* [30 EPD ¶ 33.097], 459 U.S. 874 (1982); *Unger v. Consolidated Foods Corp.* [26 EPD ¶ 32.042]. 657 F.2d 909 (7th Cir. 1981), *cert. granted, vacated, and remanded on other grounds* [29 EPD ¶ 32.733], 456 U.S. 1002 (1982); *Lutcher v. Musicians Union Local 47* [24 EPD ¶ 31.402], 633 F.2d 880 (9th Cir. 1980); *Amarnare v. Merrill Lynch, Pierce, Fenner & Smith,* 35 EPD ¶ 34.909 (S.D.N.Y. Oct. 10, 1984); *Smith v. Dutra Trucking Co.* [13 EPD ¶ 11.460], 410 F. Supp. 513 (N.D. Cal. 1976), *aff'd mem.* 580 F 2d 1054 (9th Cir. 1978); *Mathis v. Standard Brands Chemical Industries, Inc.,* 10 EPD ¶ 10.306, 10 FEP (BNA) 295 (N.D. Ga. Feb. 20, 1975).

the definition of "employee" is entitled to liberal interpretation in order to effectuate the purpose of the Act, this does not permit an overly expansive construction that would distort traditional concepts of employment relationships. *See EEOC v. First Catholic Slovak Ladies Association* [30 EPD ¶ 33.175], 694 F.2d 1068, 1070 (6th Cir.), *cert. denied* [32 EPD ¶ 33.829], 464 U.S. 819 (1983); and *Zimmerman v. North American Signal Company* [31 EPD ¶ 33.486], 704 F.2d 347; 352 (7th Cir. 1983).

In this charge, the work relationship between the Charging Party and the Respondent contained various elements commonly present in an employment context. Clearly, control over the work performed by the Charging Party rested with the Respondent, a factor that would normally strongly indicate the existence of an employer-employee relationship. Moreover, the Charging Party received a regular monthly compensation for his work and performed his job on the Respondent's premises. Further, the Respondent furnished him with the necessary tools and equipment, regulated his work hours, and supervised his work. However, these individual factors must be considered in light of the total circumstances of the relationship between the Charging Party and the Respondent.

That relationship arose from the Charging Party's having been convicted and sentenced to imprisonment in the Respondent's correctional institution. The primary purpose of their association was incarceration, not employment. Consequently, the Respondent exercised control and direction not only over the Charging Party's work performance but over the Charging Party himself. The conditions under which he performed his job were,

thus, functions of his confinement to the Respondent's institution under its control. While the Charging Party received monetary compensation for his work, that compensation was minimal and, arguably, the greater consideration was the opportunity to earn "good time" credits toward reducing his sentence. Finally, although the Charging Party was not required to work for the Respondent, his very job flowed from his incarceration and was dependent on his status as a prison inmate. Considering these circumstances as a whole, we are persuaded that the reality of the work relationship between the Respondent and the Charging Party was not one of employment. Therefore, we find that, while the Respondent is an employer within the meaning of the Act, the Charging Party was not an employee of the Respondent.

Our finding in this regard is consistent with the Department of Labor's interpretation of the term "employee" under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.* (1982). Section 3(e)(1) of that Act defines "employee" in virtually the same words as does Title VII. It is the position of the Department of Labor, which enforces the Fair Labor Standards Act, that, in circumstances such as those presented by this charge, a prison inmate is not an employee of the prison:

> Generally, a prison inmate who, while serving a sentence, is required to work by or who does work for the prison, within the confines of the institution, on prison farms, roadgangs, or other areas directly associated with the incarceration program, is not an employee within the meaning of the Act . . .

Department of Labor, Wage and Hour Division, Field Operations Handbook § 10b29(a) (June 24, 1975).

The Commission and the courts have recognized that Title VII covers more than the conventional employer-employee relationship.[4] Our conclusion, based on the facts presented in this particular case, that no employment relationship existed between the Charging Party and the Respondent makes it unnecessary to consider whether the Respondent's removal of the Charging Party for [sic] his job assignment deprived him of an employment opportunity or benefit.[5]

In light of the foregoing, we conclude that the requisite relationship did not exist between the Charging Party and the Respondent for the Commission to exercise jurisdiction over this charge.

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[4] *See* Commission Decision Nos. 79-09 and 79-32 [CCH EEOC DECISIONS (1983) ¶ 6740 and 6773, respectively] and court decisions cited therein.

[5] *But cf.* Commission decisions cited *supra* n.4.

NOTICE	NUMBER
(Automatically Cancelled	N-916
In Ninety Days)	DATE
	May, 1986

Policy Statement: Work Release Programs
(Signed May 30, 1986)

1. SUBJECT: Policy Statement on work release programs.

2. PURPOSE: This Policy Statement reflects the Commission's position on whether, and to what extent, Title VII covers organizations engaged in operating or administering work release programs for inmates.

3. ORIGINATORS: Guidance Division, Office of Legal Counsel.

4. INSTRUCTIONS:

Charges have come before the Commission that raise the issue of whether coverage under Title VII of the Civil Rights Act of 1964, as amended (Title VII or the Act), 42 U.S.C. § 2000e *et seq.* (1982), extends to organizations engaged in operating or administering work release programs for inmates. Work release programs allow certain inmates to leave their correctional facility daily for employment, training, or education; inmates spend nonworking hours at the correctional facility. The following factual situation illustrates the issue.

The Charging Party, a black inmate at a county jail, filed charges against a state department of labor and a county jail alleging that they had engaged in unlawful employment practices on the basis of his race in violation of Title VII by failing to assign him work, although he had been approved for the jail's work release program.

The work release program under consideration is authorized by state law and is optional. The county jail chose to implement the program in the following manner. Any inmate is eligible for the program after thirty days of incarceration, with the exception of certain categories of offenders who are considered poor risks. Each inmate must apply to the sheriff for permission to participate in the work release program. The sheriff may approve or reject the application. Further, once he has approved participation in the program, the sheriff may accept, revoke, suspend, or otherwise modify the plans of any inmate at any time for cause. The jail contracted with the department of labor to place inmates who were approved by the sheriff in employment and training opportunities. The role of the jail is to approve inmates for participation in the program and to refer them to the department of labor for placement.

Specifically, the Charging Party alleges that the department of labor refused to train him and refused to refer him to a particular employer because of his race. The department of labor denies both allegations. In addition, the Charging Party alleges that the sheriff refused to approve his employment at a barber shop because of his race, and that the sheriff approves more whites than blacks for work release. The sheriff does not deny refusing to approve the barber shop position, but states that he did so because the barber shop was connected to a tavern, a work environment that he considered inappropriate for an inmate. Further, the sheriff denies approving more whites than blacks for work release.

This factual situation raises the following issues: (1) whether Title VII's coverage extends to allegations of racial discrimination by the department of labor in failing to place inmates in employment and training

opportunities, and (2) whether the Act's coverage extends to allegations of racial discrimination by the jail in failing to approve inmates for participation in the work release program and failing to refer them to the department of labor.[1]

Title VII covers unlawful employment practices by employers,[2] employment agencies,[3] and labor

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[1] The discussion in this policy statement also applies to the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (1982).

[2] Section 703(a) of the Act provides:

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1982).

[3] Section 703(b) provides:

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(b) (1982).

organizations.[4] With regard to the department of labor, § 701(c) of the Act defines an employment agency as "any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer, and includes an agent of such a person."[5] The department of labor, a state governmental agency, seeks employment opportunities for inmates and for members of the public as well. Therefore, it is an employment agency and is covered by the Act. *See Morgado v. Birmingham – Jefferson City Civil Defense*, 706 F.2d 1184, 1190 (11th Cir. 1983), *cert. denied*, 464 U.S. 1045 (1984) (board was found to be an employment agency under Title VII); *Liberles v. County of Cook*, 709 F.2d 1122, 1134 (7th Cir.

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[4] Section 703(c) provides:

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization –

(1) to exclude or to expel from its membership, or otherwise to discriminate against any individual because of his race, color, religion, sex, or national origin.

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. § 2000e-2(c) (1982).

[5] 42 U.S.C. § 2000e(c) (1982).

1983) (a governmental agency may be an employment agency under Title VII); *Pegues v. Mississippi State Employment Service*, 699 F.2d 760, 762 (5th Cir.), *cert. denied*, 464 U.S. 991 (1983) (the Mississippi State Employment Service was an employment agency under Title VII); *Dumas v. Town of Mount Vernon*, 612 F.2d 974, 980 (5th Cir. 1980) (a county personnel board was an employment agency under Title VII); *Shipp v. Memphis Area Office, Tennessee Department of Employment*, 581 F.2d 1167, 1168 (6th Cir. 1978) (the Tennessee Department of Employment Security was an employment agency under Title VII); and *Carr v. Conoco Plastics, Inc.*, 423 F.2d 57, 59 (5th Cir.), *cert. denied*, 400 U.S. 951 (1970) (the Mississippi State Employment Service was found to be an employment agency under Title VII).

Turning to the issue of whether the county jail is covered by the Act, we find that it is an employer under § 701(b).[6] The Charging Party is not an

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[6] Section 701(b) provides:

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency, of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than an labor organization) which is exempt from taxation under section 501(e) of title 26, except that during the first year after March 24, 1972, persons having fewer that twenty-five employees (and their agents) shall not be considered employers.

42 U.S.C. § 2000e(b) (1982).

employee of the jail, as that term is defined in § 701(f) of the Act;[7] however Title VII's coverage extends beyond the conventional employer-employee relationship. *Spirt v. Teachers Insurance and Annuity Association*, 691 F.2d 1954, 1063 (2nd Cir. 1982), *vacated and remanded on other grounds*, 463 U.S. 1223 (1983). Although "there must be some connection with an employment relationship for Title VII's protections to apply, (t)he connection with employment need not necessarily be direct." *Lutcher v. Musicians Union Local 47*, 633 F.2d 880, 883 (9th Cir. 1980). The courts have interpreted the language of § 703(a)(1) to encompass situations where a third party, who is a § 701(b) employer, has the ability to control or interfere with the employment opportunities of another employer and its employee. *See Gomez v. Alexian Brothers Hospital*, 698 F.2d 1019, 1021 (9th Cir. 1983); *Sprit v. Teachers Insurance and Annuity Association*, 691 F.2d at 1063; *Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338, 1340-41 (D.C. Cir. 1973); *Vanguard Justice Society, Inc. v. Hughes*, 471 F. Supp. 670, 694-96 (D. Md. 1979); *Naismith v. Professional Golfers Association*, 85 F.R.D.

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[7] Section 701(f) provides:

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

42 U.S.C. § 2000e(f) (1982).

552, 358-60 (N.D. Ga. 1979); *Curran v. Portland Superintending School Committee*, 435 F. Supp. 1063, 1073 (S.D. Me. 1977); *Smith v. Dutra Trucking Co.*, 410 F. Supp. 513, 518 (N.D. Cal. 1976), *aff'd nom.*, 580 F.2d 1054 (9th Cir. 1978); *Puntillo v. New Hampshire Racing Commission*, 375 F. Supp. 1089, 1092 (D. NM. 1974); *B. Schlei & P. Grossman, Employment Discrimination Law* 998-1000 (2d ed. 1983). Thus, in this case, we must determine whether the jail is covered by Title VII because it has the ability to control or interfere with the employment relationship between an inmate and a potential employer.

First, we consider the Charging Party's allegation that more whites than blacks are selected to participate in the work release program. When the jail is deciding whether a particular inmate is eligible for work release, the only existing relationship is between the inmate and the jail. At that point, the inmate is not yet a potential employee and no potential employment relationship exists between the inmate and another employer. The inmate and the jail are in the same relationship to one another as were the prisoner and the prison in Commission Decision No. 86-7, where we stated that "(t)he primary purpose of their association was incarceration, not employment." Therefore, in determining whether individual inmates are eligible for participation in the work release program, the jail's activities are not covered by Title VII.

Next, we consider the Charging Party's allegation that, after he had been selected for the work release program, the jail discriminatorily denied him approval for employment with a particular employer because of his race. It is the Commission's view that, once an inmate is in the work release program, he is seeking an employment opportunity with an employer. When an inmate has an employment

opportunity which is subject to approval by the sheriff, the jail becomes a third party who has the ability to control or interfere with the inmate's employment opportunities with another employer, and its activities are covered by the Act.

The Commission recognizes the need for correctional institutions to exercise extreme care in selecting and controlling participants in work release programs to ensure that the public is protected from inmates who may abuse their privileges under those programs and to ensure that the inmates are placed in positions conducive to achieving the goals of the program. In exercising its authority, however, the jail must do so in accordance with the provisions of Title VII.

MAY 30 1986
Date

Approved: /s/ Clarence Thomas
Clarence Thomas
Chairman